SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 290

JAMES M. HURD AND MARY I. HURD,
Petitioners,

vs.

FREDERIC E. HODGE, LENA A. MURRAY HODGE, PASQUALE DeRITA, VICTORIA DeRITA, CONSTANTINO MARCHEGIANI, MARY M. MARCHEGIANI, BALDUINO GIANCOLA AND MARGARET GIANCOLA,
Respondents

No. 291

RAPHAEL G. URCIOLO, ROBERT H. ROWE, ISABELLE J. ROWE, HERBERT B. SAVAGE, GEORGIA N. SAVAGE AND PAULINE B. STEWART,
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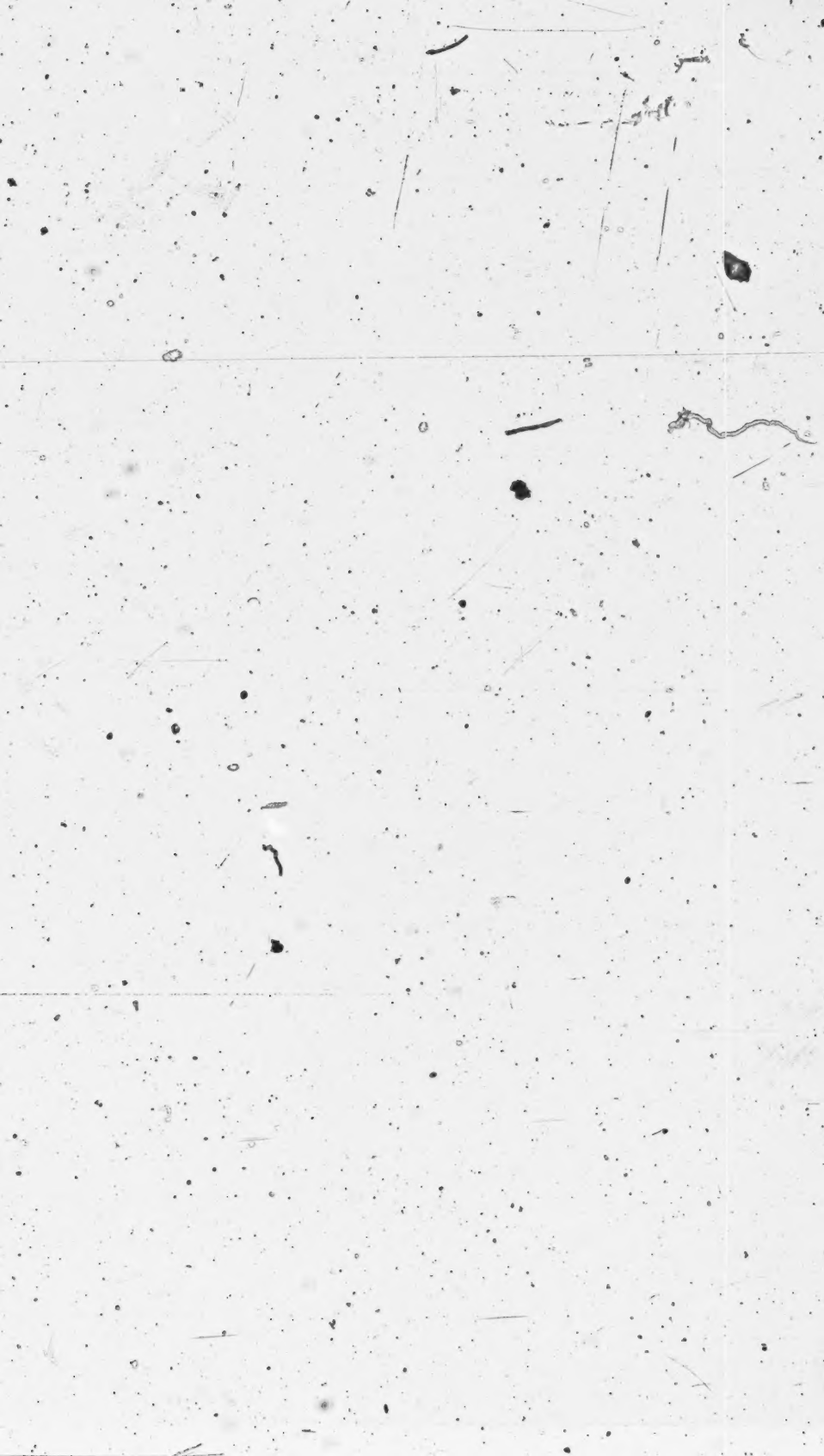
ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

CONSOLIDATED REPLY BRIEF FOR PETITIONERS

RAPHAEL G. URCIOLO, *pro se,*

CHARLES H. HOUSTON,
PHINEAS INDRITZ,
SPOTTSWOOD W. ROBINSON, III,
Attorneys for Petitioners.

January 13, 1948,
Washington, D. C.



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The Petitioners submit the following Consolidated Reply Brief to the Respondents' Consolidated Brief.

I

THE BRIEFS OF THE RESPONDENTS AND OF THE "PROTECTIVE" ASSOCIATIONS SUPPORTING RACIAL RESTRICTIVE COVENANTS DEMONSTRATE THAT THE COVENANTS ARE DEVICES FOR COMMUNITY ZONING DESIGNED TO ACHIEVE BY CIRCUMVENTION THE VERY RESULTS OF RACIAL RESIDENTIAL ZONING WHICH THIS COURT HAS HELD TO BE UNCONSTITUTIONAL. SUCH CIRCUMVENTION IS EFFECTUATED THROUGH THE USE OF GOVERNMENT POWER, IN VIOLATION OF THE CONSTITUTION.

In their briefs, the respondents and several of the *amici curiae* [1] supporting the respondents show that racial restrictive covenants constitute, and are intended to constitute, a widespread and organized zoning of urban residential neighborhoods solely on the basis of race.

> *Brief of Respondents in Nos. 290 and 291* (District of Columbia) (p. 2): ". . . All lots in the 2300 block of First Street, N. W., in Square 3125, adjoining the 20 covenanted lots on Bryant Street, are subject to the same covenant. With the exception of four houses in the 2100 block of First Street, N. W. (now occupied by Negroes) all houses on First Street, from T Street to the Soldiers Home and all houses to the east of First Street to and including Lincoln Road, from T Street north to the Soldiers Home are occupied by persons of

[1] Federation of Citizens Associations of the District of Columbia, Inc.; Citizens Forum of Columbia Heights, Washington, D. C.; The Wheel of Progress, Washington, D. C.; Columbia Improvement Association, Inc., Washington, D. C.; Arlington Heights Property Owners Association, Inc.; Adams to Washington Association; Southwest Wilshire District Protective Association; Charles Victor Hall Tract Association; Community Protective Association (Slauson-Manchester area); Slauson-Figueroa-Manchester-Central Property Owners Protective Association; Mount Royal Protective Association, Inc..

the white race (R. 380-381), and consisting of approximately 1000 homes, six churches, places of business and schools, all under either deed covenants or restrictive agreements on the Negro question . . ."

Brief of Respondents in No. 87 (Detroit) (p. 2): ". . . in Seebaldt's subdivision . . . all of the properties occupied by the parties hereto are encumbered by the . . . covenant" which expressly states (R. 42) its "purpose of defining, recording and carrying out the general plan of developing the subdivision . . . uniformly . . ."

Brief of Federation of Citizens Associations of the District of Columbia, Inc.; Citizens Forum of Columbia Heights, Washington, D. C.; The Wheel of Progress, Washington, D. C.; and Columbia Improvement Association, Inc., Washington, D. C. (p. 2): ". . . The Federation of Citizens Associations is a federation of sixty-nine (69) white citizens associations. These member associations cover the entire area of the District of Columbia . . . The interest of these organizations in the question at issue arises from their firm conviction . . . that the rule of law . . . validating and enforcing restrictive covenants, be confirmed by this court."[2]

Brief of Arlington Heights Property Owners Association, Inc., et al. (p 4): "This brief is filed on behalf of the Arlington Heights Property Owners Association, Adams to Washington Association, Southwest Wilshire District Protective Association, Charles Victor Hall Tract Association, Community Protective Association (Slauson-Manchester area) and the Slauson-Figueroa-Manchester-Central Property Owners Protective Association, which are organizations comprising several thousand Caucasian prop-

[2] On December 13, 1947, one Newell, the spokesman of the Federation of Citizens Associations and its immediate past president, indicated in a public statement that almost one-half of the residential areas of the District of Columbia are covered by restrictive covenants. *The Evening Star*, Washington, D. C., p. A-21 (Dec. 14, 1947).

erty owners in the City of Los Angeles, California . . . who are united in their desire to maintain . . . communities inhabited by persons of their own race."

Brief of Mount Royal Protective Association (pp. 5-6): "The Mount Royal Protective Association, Inc. is . . . incorporated . . . for the purpose of representing the property owners in a residential part of the City of Baltimore commonly known as the Mount Royal District. This area extends . . . about six city blocks in width and a maximum of nine in length . . . Since 1921 it has fostered . . . a movement . . . to induce property owners to preserve the neighborhood for the use of white residents by executing covenants, to be recorded among the Land Records of Baltimore City, respecting the use to which the several properties could be put to the end that they could not be occupied by negroes or persons of African descent except those employed as domestic servants by the occupants. A copy of the form of covenant which was used is filed as an appendix to this brief. Over ninety per cent of the residence properties in the district have been subjected to this restriction by this means. The restriction has been kept in force, and attempted violations have been quashed by threatened suits or by injunctions obtained from local equity courts, with the result that the properties covered by the covenant have been completely restricted in fact to occupancy by white people . . . the territory immediately adjoining the Mount Royal District lying to the southwest of Eutaw Place . . . is almost exclusively occupied by colored people. The same is true of much of the rest of the older part of Baltimore . . . much property has recently passed from white into negro hands at a profit to the white owners."

The respondents and their supporters thus confirm the fact that a widespread, organized and systematic pattern of racial zoning in most of the major metropolitan areas in the country now exists under the direction of "neighbor-

hood," "improvement," and "protective" associations, abetted by the real estate boards and their "Code of Ethics" to enforce racial residential segregation.

District of Columbia. Instances of these zoning activities in the District of Columbia are set forth in the Consolidated Brief for Petitioners (Nos. 290 and 291) at pp. 70 and 94. The Executive Secretary of the "Committee of Owners" who participated in the trial in Nos. 290 and 291 testified that the Committee sponsors and takes part in all suits to enforce racial restrictive covenants in the community (R. 70-71, 73-74). The American Veterans Committee was unable to find uncovenanted land in the District of Columbia available for its contemplated nonsegregated veterans housing project.[3]

New York. Professor Dean's survey of new subdivisions in Queens, Nassau and Southern Westchester Counties revealed widespread racial covenant zoning—"No less than 56 per cent of all homes checked were forbidden to Negroes. The proportion rises to 63 per cent for properties in developments of 20 or more houses and to 85 per cent for homes in subdivisions of 75 or more."[4]

Chicago and Detroit. The zoning activities in these cities are described in detail by the American Missionary Association in a book published after our Consolidated Brief was filed in this Court. Herman H. Long and Charles S. Johnson, *People* v. *Property, Race Restrictive Covenants in Housing* (Fisk University Press, 1947) (See Chap. III, "Neighborhood Improvement Associations," pp. 39-55; and Chap. IV, "Real Estate Organizations and Controls," pp. 56-72). Copies of this book have been filed with the Clerk of

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[3] *American Veterans Committee* brief in Nos. 72, 87, 290 and 291, p. 9.

[4] John P. Dean, "None Other Than Caucasian: A Study of Race Covenants," 23 Journal of Land & Public Utility Economics, pp. 428, 429 (Nov. 1947); *Ibid*, Architectural Forum, p. 16 (October, 1947).

this Court, and three charts therefrom showing the relation between the increase in Negro population, increase in racial restrictive covenants, and increase in neighborhood improvement associations appear in the Appendix to this Brief.

St. Louis. The Real Estate Exchange has zoned this city on official maps distributed among all realtors and forbids sales or rentals to Negroes except in designated areas (Herman H. Long and Charles S. Johnson, *supra*, p. 61); and at the trial in No. 72, members and officers of the Marcus Avenue Improvement Association indicated that its purpose is to keep the neighborhood white by promoting covenants (R. 60, 58, 54).

California. Covenant zoning is particularly virulent in this state. In Los Angeles County, the San Fernando Valley Chambers of Commerce now have a "public relations firm" to promote racial segregation by "blanketing large areas" with racial covenants premised upon prospective court enforcement of the covenants;[5] South Pasadena is "almost completely blanketed with restrictive covenants," and concerted efforts are being made to set up the whole South San Francisco peninsula as a "white" community.[6]

In all of these and other cities, racial covenants cover large proportions of the city and suburban developments, and strategically block in the existing racial ghettoes. Judicial enforcement of the covenants now before this Court means the perpetuation and enforcement of all such racial covenants and the exclusion from decent housing of substantial numbers and proportions of the population.

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[5] *California Amici Curiae* brief in No. 87, p. 5; Charles B. Spaulding, "Housing Problems of Minority Groups in Los Angeles County," 248 *Annals of the American Academy of Political and Social Science*, 220 (Nov. 1946).

[6] *Japanese American Citizens League* brief in No. 290, p. 8.

Thus, under the guise of "private contract," this Court's decisions[7] that racial residential zoning is unconstitutional are being circumvented by means of covenant zoning, a method much more iniquitous than the racial zoning ordinances held unconstitutional by this Court. See Consolidated Brief for Petitioners (Nos. 290 and 291), Part I A (4), at pp. 28-30. These covenants are intended not merely to regulate the ownership and occupancy of one lot, but rather to zone and control entire neighborhoods in every city. Such zoning arrangements are essentially governmental determinations, maintained and enforced against subsequent owners of the land regardless of their wishes, and, by virtue of the operation of the recording statutes, regardless of whether or not they knew of the restriction when they purchased. And the essential characteristic of restrictive covenant litigation is to have the government maintain and enforce this zoning through use of judicial decrees, contempt citations, fines and imprisonment. Thus, judicial enforcement of racial restrictive covenants has the same effect as a racial zoning ordinance, including the equivalent of criminal sanctions (contempt proceedings). In both cases it is *the machinery and force of government* which makes the racial zoning effective.[8]

The unanimous attempt in the briefs of the respondents in Nos. 72, 87, 290 and 291 to clothe the discrimination in the appearance of exclusively private action is thus plainly a guise, a guise which vanishes under the impact of decisions such as *Marsh* v. *Alabama*, 326 U. S. 501 (1946); *Smith* v.

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[7] *Buchanan* v. *Warley*, 245 U. S. 60 (1917); *Harmon* v. *Tyler*, 273 U. S. 668 (1927); *City of Richmond* v. *Deans*, 281 U. S. 704 (1930).

[8] The Report of the President's Committee on Civil Rights (*To Secure These Rights*, Govt. Printing Off., Oct. 29, 1947), p. 169, states: "The effectiveness of restrictive covenants depends in the last analysis on court orders enforcing the private agreement. The power of the state is thus utilized to bolster discriminatory practices. The Committee believes that every effort must be made to prevent this abuse."

Allwright, 321 U. S. 649 (1944); and *Steele* v. *Louisville & Nashville Railroad Company*, 323 U. S. 192 (1944); and *Harmon* v. *Tyler*, 273 U. S. 668 (1927).

In *Marsh* v. *Alabama*, a company which owned all the land, including the streets, of a company-owned town forbade Marsh to distribute religious literature in the streets. When Marsh refused to leave these "private" streets, she was convicted of violating a general (nondiscriminatory) state statute which made it a crime for anyone to remain on the premises after having been warned not to do so. This Court pointed out "that had the people of Chickasaw owned all the homes, and all the stores, and all the streets, and all the sidewalks, all those owners together could not have set up a municipal government with sufficient power to pass an ordinance completely barring the" exercise of the constitutional right of distributing religious literature. (326 U. S. 501, 505.) And this Court held that the totality of private ownership of the town could not exercise power, enforceable in the courts, to abridge such constitutional right. The *Marsh* decision is directly applicable here. Here, members of the community have banded together as a totality of private ownership seeking by covenant zoning to adopt for the entire community restrictions which deny the constitutional rights of Negroes to acquire and use property sold to them by willing sellers. Governmental enforcement of these restrictions through the courts promulgates a racial zoning law as effectively as an ordinance. Such *governmental* enforcement is *governmental* violation of constitutional rights. And it affects a much greater number of persons than the number of inhabitants of all the company-owned towns in the Nation.

In *Smith* v. *Allwright*, a "private" political party excluded Negroes from membership in the party and, participation in the party primary being based on party member-

ship, the election judges refused to issue ballots to Negroes to vote in that party's primary. Pointing out that the right to vote is a right secured by the Constitution against racial discrimination by the State, this Court held that "the exclusionary action of the party was the action of the State" when the State "endorses, adopts and enforces the discrimination against Negroes. . . . The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any State because of race. This grant to the people of the opportunity for choice is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied." (321 U. S. 649, 661, 664.) The *Smith* v. *Allwright* decision also is directly applicable here. Here, the government through its judicial arm "endorses, adopts and enforces the discrimination against Negroes," depriving them of their constitutional right to acquire, use and dispose of property. These discriminations, embodied in private zoning arrangements, derive their vitality almost entirely from the affirmative intervention of the power of government in maintaining and enforcing these zoning arrangements. It is settled law now that the Government may not by legislation deprive Negroes of the right to vote, whether the legislation is mandatory (*Nixon* v. *Herndon*, 273 U. S. 536 (1927)) or whether the legislation is permissive (*Nixon* v. *Condon*, 286 U. S. 73 (1932)), nor may the Government achieve the very same end through the medium of "private" political parties whose discriminations the Government "endorses, adopts and enforces" (*Smith* v. *Allwright, supra*). Similarly, the Government may not by legislation, deprive Negroes of the right to acquire, use and occupy property, whether the legislation is mandatory

(*Buchanan* v. *Warley*, 245 U. S. 60 (1917)), or whether the legislation is permissive (*Harmon* v. *Tyler*, 273 U. S. 668 (1927)), nor may the Government achieve the very same end through the medium of "private" covenant zoning whose discriminations the government "endorses, adopts and enforces."

In *Steele* v. *Louisville & Nashville Railroad Co.*, this Court held that a "private" union acting as the bargaining representative of a craft or class under authority of the Railway Labor Act may not make a binding contract discriminating against members of the craft on the basis of race because "discriminations based on race alone are obviously irrelevant and invidious" (323 U. S. 192, 203). In the *Steele* case the Brotherhood of Locomotive Firemen & Enginemen relied on governmental authority to spread the effect of the racial discriminatory contract the Brotherhood had made with the carrier, over the dissenting Negro locomotive firemen. In these cases respondents rely on governmental enforcement to spread the effect of a racial discriminatory zoning covenant, made in 1906, over the entire class of prospective Negro home owners as well as over all subsequent white successors in title, irrespective of their wishes, and thereby zone the community on the basis of the "irrelevant and invidious" distinction of race alone.

In *Harmon* v. *Tyler*, the statute held unconstitutional by this Court prohibited Negroes from establishing residence in a white community and whites from establishing residence in a Negro community "except on the written consent of a majority of the persons of the opposite race inhabiting such community or portion of the city." *Tyler* v. *Harmon*, 158 La. 439, 104 So. 200, 206 (1925); *Ibid.*, 160 La. 943, 107 So. 704 (1926). In so far as the excluded person is concerned, there is not a shadow of difference between the *Harmon* case (public racial zoning) and a racial restrictive covenant

case ("private" racial zoning). In both, whether the Negro is excluded from his property depends upon the concurrence or agreement of the white property owners. In the *Harmon* case, the white property owners acted under governmental authority expressed in statutory form. In a racial covenant case the white property owners make their zoning compact under governmental authority expressed in what the majority opinion of the court below described as a "settled . . . rule of law." *Hurd* v. *Hodge*, 162 F. (2d) 233, 234 (1947) (R. 418, 419). Certainly, at the point of enforcement, there is no difference. In the *Harmon* case, the white property owners asked the State, through its judicial arm, to enjoin the occupancy of the property in the neighborhood by Negroes. That is exactly what is done in a racial covenant case.

The prosecution in the *Marsh* case was under a general rule of law; the membership rule "endorsed, adopted and enforced" by the State in *Smith* v. *Allwright* was a general rule; the authority of the union to act as exclusive bargaining representative in the *Steele* case was a general rule. The rules themselves on their face were non-discriminatory. And the statute in the *Harmon* case forbidding the establishment of residence by members of one race in a community inhabited principally by members of the other race "except on the written consent of a majority of the persons of the opposite race inhabiting such community" applied to both whites and Negroes. But when these general rules were applied so that the power of government "endorsed, adopted and enforced" the racial discriminations sought to be achieved by the "private" company, the "private" political party, the "private" labor union, or the "private" white property owners, this Court struck down the governmental enforcement of the discriminations. So here, "private" zoning of communities through restrictive covenants when enforced by the judicial arm of government, becomes

governmental action which "endorses, adopts and enforces" racial discrimination in violation of the Constitution.

This is not "novel" doctrine. As early as 1883 this Court recognized in the *Civil Rights Cases*, 109 U. S. 3, 16 (1883), that the constitutional limitations apply "against State laws and *proceedings*, and *customs having the force of law.*"

> ". . . Whether the statute book of the State actually laid down any such rule of disqualification, or not, the State, through its officer, enforced such a rule: and it is against such State action, through its officers and agents, that the" [14th amendment applies]. (109 U. S. 3, 15; Consolidated Brief for Petitioners in Nos. 290 and 291, p. 20).

II

RESPONDENTS' CONTENTION THAT THE PETITIONERS HAVE NO RIGHTS BECAUSE THEY KNEW OR HAD CONSTRUCTIVE NOTICE OF THE RESTRICTION IS ENTIRELY WITHOUT MERIT.

The respondents make the following contention in their briefs (No. 72, p. 67; No. 87, pp. 3, 6, 7, 13; Nos. 290 and 291, pp. 3, 12-13, 14): The Petitioners, when the houses here involved were sold, had actual knowledge of the restrictions or had constructive notice thereof by virtue of the previous recording of the covenants, and thereby either became parties to the covenants or were estopped to challenge the judicial enforcement of the covenants as unconstitutional and illegal deprivations of their rights to acquire, own, occupy and dispose of these houses.

The respondents' contention is entirely fallacious.

Realistically, the Petitioners were not dealing in abstractions—they were concerned with physical objects: Urciolo

selling houses and lots, the grantees acquiring living space and shelter from the elements. Neither ever agreed to any restriction which would prevent Negro purchasers, solely because they were born Negroes, from acquiring and occupying the houses.

Even if these restrictions be deemed contracts between the persons who signed the instruments containing the restrictions, the covenantors had no authority to contract away the rights of *other persons* who had never given up *their* rights to own, occupy and dispose of the properties. Subsequent grantees did not become "parties" to any such discriminatory "contract" by their purchase of the land, nor did they thereby "waive" their constitutional rights.

But even if such subsequent purchasers could be deemed by virtue of actual knowledge or "constructive notice" of the restriction, either to have become "parties" to the restriction or to have assented to it, they are not estopped from challenging the validity of judicial enforcement of such discriminatory covenants. Knowledge of a restriction does not estop a person from challenging it or its enforcement against him. Even where a person knowingly violates a statutory enactment he is not precluded from making such challenge.[9] A mere covenant or contract is certainly of lesser dignity than a statute which is "encased in the armor wrought by prior legislative deliberation."[10]

This Court has uniformly refused to invoke any "estoppel" against a party to a contract who challenges the enforcement of the contract on grounds that it is against

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[9] The sellers and buyers of the land in *Buchanan* v. *Warley*, 245 U. S. 60 (1917), *Harmon* v. *Tyler*, 273 U. S. 668 (1927), and *City of Richmond* v. *Deans*, 281 U. S. 704 (1930) knew of the pre-existing racial segregation statute when they entered into their land transactions. But they were not "estopped" to challenge the validity of the statute.

[10] *Bridges* v. *California*, 314 U. S. 252, 261 (1941).

public policy or contrary to law.[11] The public interest which is served by the challenge to the enforcement of a contract against public policy or law so greatly outweighs the interest of enforcing agreements between parties that no "estoppel" is permitted to prevent or impede the challenge, irrespective of knowledge of the agreement; and this is so even where a defendant has specifically contracted with the plaintiff that he will not challenge that very contract.[12] The enforcement of the covenant restrictions in the present cases on the basis of "estoppel" would result in the destruction of constitutional rights; would violate section 1978, Revised Statutes (8 U. S. C. 42), which entitles all citizens to acquire, hold and dispose of property irrespective of color; and would frustrate both the public policy against racial discrimination and the "broad public interest in freeing our competitive economy from the trade restraints"[13] imposed by these racial restrictions. These important considerations of constitutional rights and public policy militate against the application of any estoppel doctrine.

Nor does the recording of the restrictive covenant lend any greater sanctity to the "estoppel" contention. If anything, reliance upon the recording statutes to impute

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[11] *Edward Katzinger Co.* v. *Chicago Metallic Mfg. Co.*, 329 U. S. 394 (1947); *MacGregor* v. *Westinghouse Electric Mfg. Co.*, 329 U. S. 402 (1947); *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 177 (1942); *Anderson* v. *Carkins*, 135 U. S. 483 (1890); *Bement* v. *National Harrow Company*, 186 U. S. 70 (1902); *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 212 U. S. 227 (1909); *Kennett* v. *Chambers*, 55 U. S. (14 How.) 38 (1852); *Hyer* v. *Richmond Traction Co.*, 168 U. S. 471 (1897); *Beasley* v. *Texas & Pacific Ry. Co.*, 191 U. S. 492 (1903); *McMullen* v. *Hoffman*, 174 U. S. 639 (1899); *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373 (1911); *Texas & Pac. Ry. Co.* v. *Marshall*, 136 U. S. 393 (1890); *Burt* v. *Union Central Life Ins. Co.*, 187 U. S. 362 (1902); *Sprott* v. *United States*, 87 U. S. (20 Wall.) 459 (1874).

[12] *Edward Katzinger Co.* v. *Chicago Metallic Mfg. Co.*, 329 U. S. 394 (1947).

[13] *Ibid*, at p. 400.

constructive notice in racial restrictive covenant cases as a basis for the cancelation of the deeds and the ouster of the grantees solely because of their race plainly emphasizes how completely the enforcement of the covenant is grounded on governmental authority in order to achieve racial residential segregation.[14] In *Buchanan* v. *Warley*, 245 U. S. 60 (1917), an ordinance to achieve racial residential segregation was held unconstitutional. The application of the recording statutes to achieve the same result is equally unconstitutional.[15]

III

NONE OF THE OTHER PROPOSITIONS URGED AND DECISIONS CITED BY THE RESPONDENTS SUPPORT THEIR CONTENTIONS HERE.

The respondents seek to justify the enforcement of these racial restrictive covenants by reference to the cases involving separate accommodations in transportation, schools, etc., under the so-called "separate but equal" doctrine. Those cases are entirely inapplicable here. Here there is no provision whatever for even allegedly comparable separate housing facilities for whites and non-whites. Here the thesis is complete exclusion of Negroes and colored people from the community. This Court has settled that the "separate but equal" doctrine has no application to the acquisition and use of land. *Buchanan* v. *Warley*, 245 U. S. 60 (1917). Land and housing are unique.

Equally inapplicable is the proposition urged by one of

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[14] Loren Miller, "Race Restrictions on Ownership or Occupancy of Land", 7 Lawy. Guild Rev. 99, 105 (May-June, 1947).

[15] *Cf. Fiske* v. *Kansas*, 274 U. S. 380 (1927); *Thomas* v. *Collins*, 323 U. S. 516, 532-533 (1945); *Marsh* v. *Alabama*, 326 U. S. 501, 504, 509 (1946).

the *amici*[16] supporting the respondents (but not urged in any of the respondents' briefs) that judicial error in the rendition of a decision does not violate due process. The decrees below are not a mere judicial choice between two possible rules either of which could be selected by a legislature without violation of constitutional limitations. Here the decrees achieve the very result expressly forbidden to the legislature by the Fifth and Fourteenth Amendments and hence are an unconstitutional invasion by the judicial power into a forbidden field. Demonstrating that there is no difference between judicial and legislative violation of constitutionally protected rights, this Court, on the issue of exclusion of Negroes from jury service, decided *Ex Parte Virginia*, 100 U. S. 339, 25 L. Ed. 667 (March 1, 1880) (exclusion by a judge) and *Strauder v. West Virginia*, 100 U. S. 303, 25 L. Ed. 664 (March 1, 1880) (exclusion by statute) *on the same day*, and deemed both types of exclusion to be equally unconstitutional. Furthermore, none of the decisions in which the "judicial error" proposition was followed involved racial issues. Freedom from racial discrimination by governmental power is a field especially protected under our Constitution.[17] No court may, under the guise that its "erroneous" decision is not subject to constitutional limitations, authorize or effect either governmental imposition of racial discrimination, or the denial of constitutional rights.[18] Whatever may be said for the decisions holding that judicial error does not violate due process, it is now clear in the light of the more recent decisions by this Court, that judicial action is governmental action within the confines of the due process clause and may

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[16] *National Association of Real Estate Boards* brief in No. 72.

[17] *Yick Wo* v. *Hopkins*, 118 U. S. 356, 374 (1886); *Korematsu* v. *United States*, 323 U. S. 214, 216 (1944); *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943); *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 203, 208 (1944); *Smith* v. *Texas*, 311 U. S. 128, 130 (1940).

[18] *Brown* v. *Mississippi*, 297 U. S. 278, 280, 286-287 (1936).

not accomplish "that which if done under express legislative sanction would be violative of the Constitution." *Hovey* v. *Elliott*, 167 U. S. 409, 417-418 (1897); *A. F. of L.* v. *Swing*, 312 U. S. 321 (1941); *Prudential Insurance Company* v. *Cheek*, 259 U. S. 530, 547-548 (1922); *Marino* v. *Ragen*, — U. S. — (No. 93, Dec. 22, 1947). (See also Consolidated Brief for Petitioners, Nos. 290 and 291, pp. 20-28, 38-39.) In the *Hovey* and *A. F. of L.* cases, a judicial decision was held *to violate due process* because a statute achieving the same result would have been equally unconstitutional. In the *Prudential Insurance* case, a judicial decision was held not *to violate due process* because a statute achieving the same result would have been constitutional. In all three cases, the standard for testing the constitutionality of the judicial decision under the due process clause was whether a statute achieving the same result would be constitutional.[19]

The respondents say that if the racially discriminatory covenant is not enforceable in the courts, then "the respondents certainly would be deprived of their property without due process of law." (Respondents' Brief in Nos. 290 and 291, pp. 13, 9-10; Respondents' Brief in No.

[19] The respondents' quotation from *United States* v. *Dunnington*, 146 U. S. 338, 351 (1892) for the proposition that federal courts are not agencies of the Federal Government was only *dictum*—the issue was whether a suit against the United States could be maintained in the Court of Claims for the value of condemned land where the United States had paid the appraised value into court as required by statute but the true owner had not received the money, and the Court expressly stated that the question whether the court's clerk erred in paying the money to others was not involved (146 U. S. 338, 353). The respondents' quotation from *Anderson National Bank* v. *Luckett*, 321 U. S. 233, 246 (1944), for the proposition that due process means only notice and an opportunity to be heard is lifted out of context since the issue was whether a *particular* form of notice met the requirements of due process. The respondents' quotation from *Railway Mail Association* v. *Corsi*, 326 U. S. 88, 94 (1945), for the proposition that "the prohibitions of the Fourteenth Amendment are addressed to legislative action" does not prove that the Amendment is inapplicable to judicial action since that case involved the validity of a statute.

87, pp. 9-12). But no one is seeking to oust the respondents from their homes or to cancel their deeds, or to interfere in any way with their use and enjoyment of their own property. If the respondents mean that they have a "property right" to call on the Government to prevent owners of other land from willingly selling it to Negroes or colored people, their argument is "a distortion of the policy manifested in" the Due Process Clause which was adopted to prevent, not to require, governmental discrimination on the basis of race. *Railway Mail Association* v. *Corsi*, 326 U. S. 88, 94 (1945). The respondents cannot, under any guise of "contract," require the government to enforce racial discrimination in violation of the constitutional rights of others. Nor is the respondents' alleged "property right" the kind of "property right" in lands of other people which the courts should recognize or enforce. *Beasley* v. *Texas & Pacific R. Co.*, 191 U. S. 492, 496-497 (1903); *Norcross* v. *James*, 140 Mass. 188, 191-193, 2 N. E. 946, 948-949 (1885). Furthermore, if the respondents had purchased their property in reliance on a zoning statute they would not be immune from changes in such zoning, nor are they immune from any judicial refusal to enforce this covenant zoning which is based solely on racial discrimination. And to the respondents' plaintive question: "where except in the courts may contracts be peacefully enforced?", the short answer is that there are many contracts which courts do not enforce even though the making of the contracts may not have been unlawful. *E.g.*, Anson on Contracts, sec. 272 (Patterson ed., 1939); Williston on Contracts, vol. V, sec. 1630 (Rev. ed., 1937); vol. VI, secs. 1722, 1725, 1744a (Rev. ed., 1938).

The respondents, in contending that the enforcement of racial restrictive covenants is not contrary to public policy, entirely ignore the effects of racial restrictive covenants on the housing, health, morals, and welfare of Negroes and

of the entire community. The respondents, apparently, view "public policy" as meaning only *their* policy.

The respondents cite *Cowell* v. *Springs Co.*, 100 U. S. 55 (1879) in support of their contention that racial restrictive covenants are not undue restraints on alienation. That case involved a restraint on use, not a restraint on alienation or occupancy, and in no way involved race. Restraints on *use* stand on entirely different bases than restraints on *occupancy by people*. See Consolidated Brief for Petitioners in Nos. 290 and 291, pp. 127-131. Furthermore, the Court's statement that it is permissible to prohibit "alienation to particular persons" was only a *dictum* in that case. But, even more important, the *Cowell dictum* referred only to "*particular* persons" (100 U. S. 55, 57), not to "20,000,000 Americans of minority groups" or to "any racial or religious group against whom prejudice is directed."

The respondents' brief fails utterly to show any basis, other than the perpetuation of their racial prejudice, for the continued enforcement of racial restrictive covenants, or to demonstrate that any one of the grounds urged by the Petitioners against such continued enforcement is in any way unsound.

IV

FURTHER EXPRESSIONS OF THE POLICY OF THE UNITED STATES AGAINST RACIAL DISCRIMINATION.

Subsequent to the filing in November 1947 of the Petitioners' briefs in these cases, there have been several further noteworthy expressions of the plain policy of the United States to protect, guarantee and promote fundamental civil rights and freedom from racial discrimination, both nationally and internationally.

(a) *United Nations Commission on Human Rights.* The function of the United Nations Commission on Human

Rights is to implement the Charter of the United Nations which obligates the member nations to "promote . . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race . . ." Articles 55(c), 56 (59 Stat. 1031, 1045-1046). The Second Session of the Commission was held at Geneva, Switzerland, from December 2 to 17, 1947. On December 1, 1947, the United States Department of State announced the text of the international Declaration of Human Rights which the United States would propose for adoption by the United Nations Commission on Human Rights.[20] The following provisions are particularly pertinent to these cases:

> "Article I. Every one is entitled to life, liberty, and equal protection under law.
>
> "Article III. No one shall be subjected to unreasonable interference with his . . . family, home . . . No one shall be arbitrarily deprived of his property.
>
> "Article IX. Every one has the right to a decent living . . . to health . . . There shall be equal opportunity for all to participate in the economic and cultural life of the community.
>
> "Article X. Everyone, everywhere in the world, is entitled to the human rights and fundamental freedoms set forth in this declaration without distinction as to race, sex, language, or religion. . . ."

On December 17, 1947, under the Chairmanship of the United States Representative, the United Nations Commission on Human Rights adopted a Declaration and a

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[20] For text of the United States Proposal for the Declaration of Human Rights by the General Assembly of the United Nations, see *The Evening Star*, Washington, D. C., p. A-7 (December 1, 1947). The United States has been the leader in the international formulation of the basic human rights. See *Summary Review of the Conference on the Proposed International Declaration on Human Rights held at the Department of State, Washington, D. C. on October 31, 1947* (issued by Division of Public Liaison, U. S. Dept. of State, on November 25, 1947).

Convention on Human Rights which will eventually be submitted to the General Assembly of the United Nations for adoption, and, when ratified by two-thirds of the Members of the United Nations, will become binding between them.[21] In addition, the Commission adopted a Resolution that specific clauses to protect minority rights and human freedoms should be inserted in all future peace treaties.[22] The following provisions of the Commission's Declaration on Human Rights are particularly pertinent to these cases:

> "Article 1. All men are born free and equal in dignity and rights. . . .
>
> "Article 3. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race. . . . All are equal before the law regardless of office or status and entitled to equal protection of the law against any arbitrary discrimination. . . .
>
> "Article 7. Everyone has the right to life, to liberty and security of person.
>
> "Article 12. Everyone shall be entitled to protection under law from unreasonable interference with . . . his family. His home . . . shall be inviolable.
>
> "Article 13. Subject to any general law not contrary to the purposes and principles of the United Nations Charter . . . there shall be liberty of movement and

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[21] For the text of the Declaration and Convention on Human Rights adopted by the United Nations Commission on Human Rights, see Press Release SOC/307 (17 December 1947) issued by the United Nations Department of Public Information, Press and Publications Bureau, Lake Success, N. Y. These proposed formulations of an International Bill of Rights were not hastily conceived--they were preceded by comprehensive and documented studies, with suggestions and drafts from almost every nation in the world and from numerous private organizations and individuals. Illustrative is the 408 page compilation: United Nations Economic and Social Council (E/CN4/AC1/3 Add. 1—2 June 1947), Commission on Human Rights Drafting Committee, International Bill of Rights, Documented Outline.

[22] Press Release SOC/310 (19 December 1947) issued by United Nations Dept. of Public Information, *supra*.

free choice of residence within the borders of each state. . . .

"Article 17. Everyone has the right to own property in conformity with the laws of the state in which such property is located. No one shall be arbitrarily deprived of his property.

"Article 33. Everyone . . . has the right to the preservation of his health through the highest standards of . . . housing . . . which the resources of the state and community can provide. . . .

It is significant that provisions against racial discrimination are in the Constitutions of most of the countries of the world. See the mimeographed Memorandum of 20 October 1947 (E/CN.4/Sub. 2/4) by the Division of Human Rights of the United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and the Protection of Minorities (copies of which have been filed with the Clerk of this Court), quoting provisions of national constitutions of countries throughout the world concerning prevention of discrimination and protection of minorities.

The important effects of racial discrimination on the position of the United States in its international relations is strikingly illustrated by the recent refusal of the Republic of Panama to lease to the United States 13 military bases in Panama, largely because of racial discrimination practiced against Panamanians. *The Washington Post*, December 24, 1947, pp. 1 and 2; December 28, 1947, Editorial Section, pp. 1B and 6B.

(b) *The President's Commission on Higher Education.* On December 11, 1947, the President's Commission on Higher Education, in its comprehensive Report, *Higher Education for American Democracy*, vigorously condemned

racial and religious discrimination in education.[23] The President's Commission demonstrated that racial segregation in schools deprived Negroes of equal educational opportunities and reduced the quality of education for whites as well. The President's Commission urged that: "6. The time has come to make public education at all levels equally accessible to all, without regard to race, creed, sex or national origin" by renouncing "the practices of discrimination and segregation in educational institutions as contrary to the spirit of democracy." *Report of President's Commission*, etc., vol. I, p. 38. Especially pertinent to these cases is the Commission's finding that even "in States in which segregation [in schools] is not legalized", residential segregation produces "neighborhoods, which are frequently characterized by poorer school buildings, less equipment and less able teachers." *Report of President's Commission*, etc., vol I, p. 34; see also vol. II, p. 31.

(c) *President Truman's State-of-the-Union Message to Congress (January 7, 1948).* Appearing personally before Congress, President Truman just a few days ago stated to Congress, in his annual State-of-the-Union Message of January 7, 1948:[24]

> "Our first goal is to secure fully the essential human rights of our citizens.
>
> "The United States has always had a deep concern for human rights. . . . Any denial of human rights is a denial of the basic beliefs of democracy and of our regard for the worth of each individual.
>
> "Today, however, some of our citizens are still denied equal opportunity for education, for jobs and

[23] Report of the President's Commission on Higher Education, *Higher Education for American Democracy*—Vol. I, "Establishing the Goals," pp. 27, 32-36, 38-39; Vol. II, "Equalizing and Expanding Individual Opportunity", pp. 25-36 (Govt. Printing Office, December 1947).

[24] *The Evening Star*, Washington, D. C., p. A-6 (January 7, 1948).

economic advancement, and for the expression of their views at the polls. Most serious of all, some are denied equal protection under our laws. Whether discrimination is based on race, or creed, or color, or land of origin, it is utterly contrary to American ideals of democracy.

"The recent report of the President's Committee on Civil Rights points the way to corrective action by the Federal Government and by State and local governments. Because of the need for effective Federal action, I shall send a special message to the Congress on this important subject.

". . . the youth of our Nation are handicapped when millions of them live in city slums and country shacks . . . we must see that every American family has a decent home." . . .[25]

"Above all else, we are striving to achieve a concord among the peoples of the world based upon the dignity of the individual and the brotherhood of man. . . .

"This is a time to remind ourselves of these fundamentals. For today the whole world looks to us for leadership."

V

RACISM AND WORLD WAR II.

Wars involving conflicts of ideology necessarily change the relations and thinking of mankind. From the 1861-65 holocaust of Civil War between the North and the South, involving the issue of slavery, came the 13th, 14th and 15th

[25] President Truman has recently repeatedly stressed the pressing need "to provide decent housing for . . . minority groups" (Message to the 14th Annual Convention of the National Association of Housing Officials meeting on November 17, 1947, *The Evening Star*, Washington, D. C., p. A-2, Nov. 17, 1947) and the right of every citizen to secure a decent home without discrimination because of race (Address at 38th Annual Conference of the National Association for the Advancement of Colored People on June 29, 1947, 93 Cong. Rec. A-3505, July 2, 1947; *The Washington Post*, p. 4, June 30, 1947).

Amendments to the Constitution to eliminate slavery and elevate the former slaves to citizenship and equality before the law. In the bloodier World War II one of the fundamental issues was racism. That War, and the threat of atomic weapons, guided missiles and other improved techniques of mass death, have brought the realization that racism and other catalysts for war must be eradicated from the world if civilization is to survive. The Axis nations with their racist philosophies were vanquished in World War II. From the lessons of that struggle have come the human rights policies of the United Nations Charter, the Declaration and Convention on Human Rights adopted by the United Nations Commission on Human Rights to implement those policies, the soul-searching Report of the President's Committee on Civil Rights, the Report of the President's Commission on Higher Education, and the national and world-wide emphasis on elimination of racial and religious discriminations as possible catalysts for future wars.

The judicial enforcement of racial restrictive covenants is plainly incompatible with the ideological thrust of World War II and the national and international policy against racism, and should no longer be countenanced in this country.

CONCLUSION

It is respectfully requested that this Court, for the reasons urged in our Consolidated Brief and in this Consolidated Reply Brief, reverse the judgments of the court below.

RAPHAEL G. URCIOLO, *pro se*,

CHARLES H. HOUSTON,
PHINEAS INDRITZ,
SPOTTSWOOD W. ROBINSON, III,
Attorneys for Petitioners.

January 13, 1948, Washington, D. C.

APPENDIX

Chart 1—Increase in Number of Race Restrictive Housing Covenants, Chicago and St. Louis, 1910-1945 29

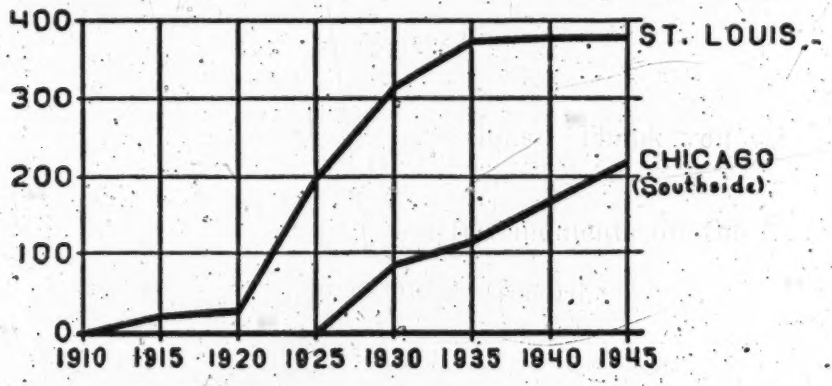
Chart 2—Increase in Negro Population Compared With Increase in Race Restrictive Housing Covenants, Chicago and St. Louis, 1910-1940 31

Chart 3—Increase in Neighborhood Improvement Associations Compared With Increase in Race Restrictive Housing Covenants, Chicago, Illinois, 1890-1945 33

APPENDIX

CHART 1

INCREASE IN NUMBER OF RACE RESTRICTIVE HOUSING COVENANTS, CHICAGO AND ST. LOUIS, 1910–1945



from Herman H. Long and Charles S. Johnson, *People vs. Property: Race Restrictive Covenants in Housing* (Fisk University Press, 1947), p. 13

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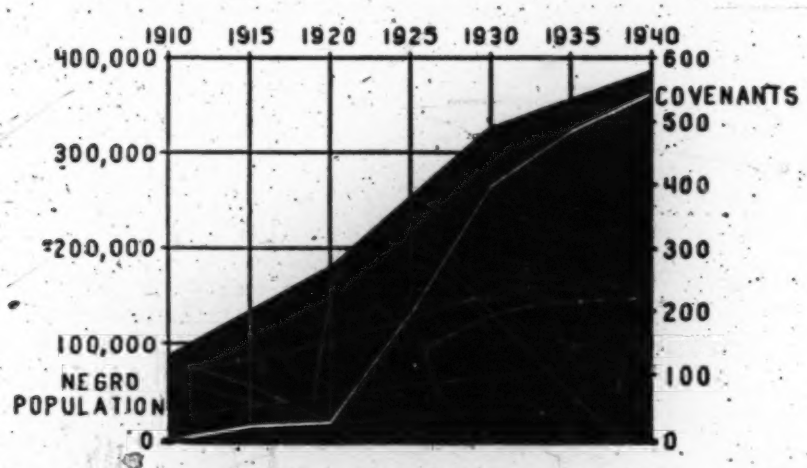
CHART 2

INCREASE IN NEGRO POPULATION COMPARED WITH INCREASE IN RACE RESTRICTIVE HOUSING COVENANTS, CHICAGO AND ST. LOUIS, 1910–1940



from Herman H. Long and Charles S. Johnson, *People vs. Property: Race Restrictive Covenants in Housing* (Fisk University Press, 1947), p. 15

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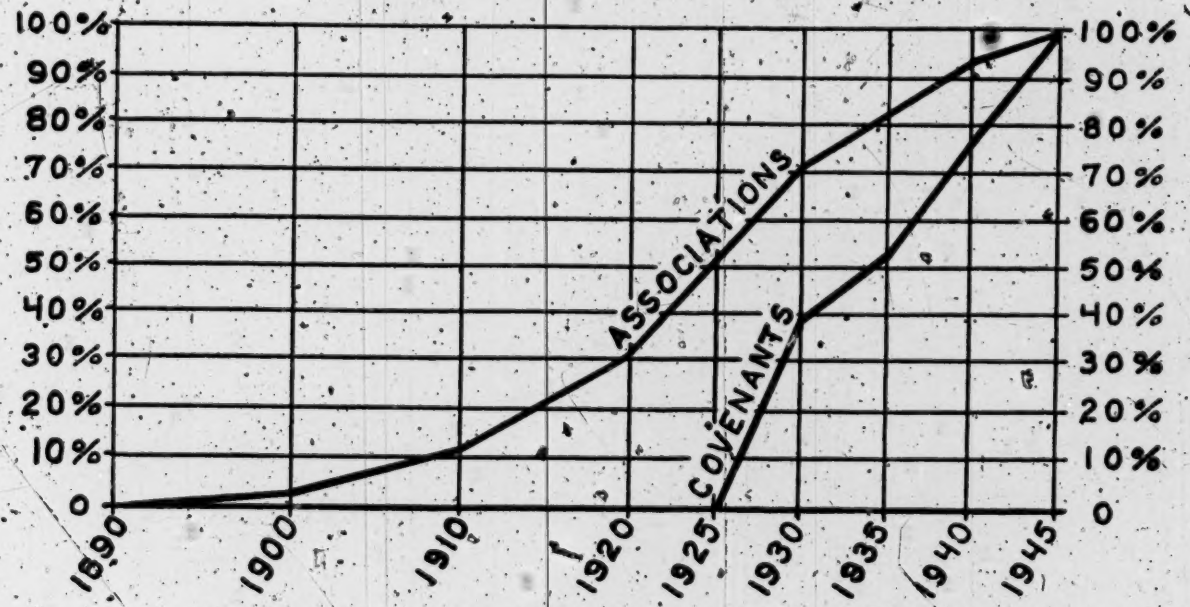
INCREASE IN NEIGHBORHOOD IMPROVEMENT ASSOCIATIONS COMPARED WITH INCREASE IN RACE RESTRICTIVE HOUSING COVENANTS CHICAGO, ILLINOIS, 1890-1945



from Herman H. Long and Charles S. Johnson, *People vs. Property: Race Restrictive Covenants in Housing* (Fisk University Press, 1947), p. 43

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